

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**In re: RealPage, Inc., Rental Software
Antitrust Litigation (No. II)**

Case No. 3:23-md-03071

MDL No. 3071

Judge Waverly D. Crenshaw, Jr.

This Document Relates to:

All Cases

**NOTICE OF SUPPLEMENTAL AUTHORITY
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND RESPONSE TO THE
DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST**

Defendants respectfully submit this Notice of Supplemental Authority in support of their Motion to Dismiss the Multifamily Plaintiffs' Second Amended Consolidated Class Action Complaint (ECF 593), Motion to Dismiss the Student Plaintiffs' First Amended Consolidated Class Action Complaint (ECF 588), and Defendants' Response to the Department of Justice's Memorandum of Law in Support of the Statement of Interest of the United States (ECF 644). Last week, in a rejection of the government's position, the U.S. Court of Appeals for the Fourth Circuit overturned an antitrust conviction of a former company executive based on claims that steel and aluminum manufacturers and distributors rigged bids to the North Carolina Department of Transit. *See United States v. Brewbaker*, No. 22-4544 (4th Cir. Dec. 1, 2023) (attached hereto as Exhibit 1). The court reversed the Sherman Act § 1 conviction but affirmed the fraud conviction. The court's decision supports Defendants' Motions to Dismiss.

First, the Fourth Circuit reversed because "the indictment did not allege a *per se* violation of the Sherman Act," and thus the District Court erred in applying the *per se* rule to the Sherman Act charge. *Id.* at 10. The court reasoned that when an alleged agreement involves both a horizontal and vertical restraint on trade, as in *Brewbaker*, the rule of reason applies. *Id.* The

court explained that the *per se* rule may apply to an alleged hub-and-spoke conspiracy when “crucially the vertical entity is not a party to the competitors’ agreement” and “the parties to the competitors’ agreement are related only horizontally.” *Id.* at 19. The Fourth Circuit emphasized that “it is to this *purely horizontal restraint* that the *per se* rule applies.” *Id.* (emphasis added). The court also emphasized that hub-and-spoke conspiracies involving vertical restraints consistently have been analyzed under the rule of reason. *Id.* at 13. The Fourth Circuit’s decision confirms that Plaintiffs have not alleged a *per se* claim here. Rather, they have alleged a conspiracy with a crucial vertical component in which RealPage is an essential party to the purported conspiratorial agreement. Thus, the parties to the alleged agreement are *not* “related only horizontally.”¹

Second, *Brewbaker* emphasizes that the rule of reason applies to hub-and-spoke conspiracies involving vertical restraints because “caselaw and economic analysis shows that category of restraint may have procompetitive effects” and are not necessarily “devoid of any redeeming virtue”—unlike naked horizontal price-fixing agreements. Ex. 1 at 10, 13. Plaintiffs acknowledge the “redeeming virtue” of RealPage’s RMS here, alleging independent, procompetitive reasons for Lessor Defendants to use RealPage’s RMS, which Plaintiffs admit many did long before the start of the alleged conspiracy. *See* ECF 593 at 7; ECF 530 at ¶¶ 209, 235, 290 n.160, 298. This is antithetical to the *per se* rule, which “only applies automatically to restraints that have already been held to be devoid of procompetitive effects.” Ex. 1 at 12.

¹ *See, e.g.*, ECF 623 at 1 (“Each Defendant knowingly entered into a common scheme: RealPage would drive prices increases on behalf of Property Defendants using RealPage’s Revenue Management Solutions software.”); *id.* at 27 (citing ECF 530 at ¶¶ 67-193 (detailing each defendant’s vertical agreement with RealPage to use one of its three revenue management solutions); ECF 530 at ¶¶ 4-6 (describing alleged conspiracy to “delegate [Defendants’] rental price and supply decisions to a common decision maker, RealPage,” and “abide by RealPage’s price and supply decisions generated by RMS”). *See also* ECF 593 at 3; ECF 639 at 1.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

/s/ David Cross

David Cross